INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	3
Specification of errors to be urged	6
Reasons for granting the writ	6

CITATIONS

Cases:

Canoe Creek Coal Co. v. *Christinson*, 281 Fed. 559, reversed, 293 Fed. 379, 266 U. S. 42 — 12

Creekmore v. *United States*, 237 Fed. 743, certiorari denied, 242 U. S. 646 — 12

Forrest v. *United States*, 277 Fed. 873 — 12

Hill v. *United States ex rel. Joseph Weiner*, 11 F. Supp. 195 — 2

Local 167 et al. v. *United States*, 291 U. S. 293 — 2, 4, 9, 13

Michaelson v. *United States*, 266 U. S. 42 — 12

Swepston v. *United States*, 251 Fed. 205 — 12

United States v. *Goldman*, 277 U. S. 229 — 6, 10, 15

United States, v. *Greater New York Live Poultry Chamber of Commerce et al*, 291 U. S. 293 — 9

United States v. *Taliaferro*, 290 Fed. 214 affirmed, 290 Fed. 906 — 9

Statutes:

Clayton Act, Section 21, 28 U. S. C. A. 386 — 2, 7

Clayton Act, Section 22, 28 U. S. C. A. 387 — 2, 7

Clayton Act, Section 24, 28 U. S. C. A. 389 — 2, 8

Norris-La Guardia Anti-Injunction Act, Section 11, 29 U. S. C. A. 111 — 14

Sherman Antitrust Act, 15 U. S. C. A. 1, 2, 4 — 4

Section 268 of the Judicial Code, 28 U. S. C. A. 385 — 9

Miscellaneous:

Congressional Record, 48, pt. 9, pp. 8778, 8779, 8780, 8785 — 9

Congressional Record, 48, pt. 12, App. p. 314 — 9

79577—36——1

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. ——

HENRY C. HILL, WARDEN, UNITED STATES NORTHEASTERN PENITENTIARY, PETITIONER

v.

UNITED STATES EX REL. JOSEPH WEINER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of petitioner, Henry C. Hill, Warden of the United States Northeastern Penitentiary, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above entitled case on June 8, 1936, affirming the order of the District Court for the Middle District of Pennsylvania, which directed petitioner to release the relator, Joseph Weiner, from the United States Northeastern Penitentiary.

OPINIONS BELOW

The opinion of the District Court (R. 286–292) on the petition for writ of habeas corpus, filed June 25, 1935, is reported in 11 F. Supp. 195. The majority and dissenting opinions in the Circuit Court of Appeals, filed January 8, 1936, and the opinion on rehearing, filed June 8, 1936, are not yet reported.

The decree violated by Weiner was affirmed by this Court in *Local 167 et al.* v. *United States,* 291 U. S. 293 (1934).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 8, 1936. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The principal question presented is whether the six months' limitation on sentences for certain classes of criminal contempt, as provided in Sections 21 and 22 of the Clayton Act (28 U. S. C. A. 386, 387), applies to contempts for disobedience of decrees entered in suits brought by the United States; or whether such contempts are excepted from Sections 21 and 22 by Section 24 of the Clayton Act (28 U. S. C. A. 389), which provides that nothing contained in Sections 21 and 22 "shall be construed to relate to * * * contempts committed in disobedience of any lawful * * *

decree * * * entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States."

Additional questions presented are:

(a) Whether the contempts of which Weiner was convicted were shown to be independent criminal offenses within the meaning of Section 21 of the Clayton Act;

(b) Whether the contempt trial followed the procedure of the Clayton Act rather than the ordinary procedure for criminal contempt;

(c) Whether Section 24 of the Clayton Act is repugnant to the Fifth Amendment of the Constitution, in that it classifies contempt proceedings growing out of Government decrees separately from those growing out of private decrees;

(d) Whether Weiner consented to the imposition of a sentence in excess of six months.

STATUTES INVOLVED

The pertinent provisions of the Clayton Act (Secs. 21–25) and Section 268 of the Judicial Code are set forth below in "Reasons for Granting the Writ."

STATEMENT

Relator, Joseph Weiner, was one of five defendants convicted on March 29, 1934, after a trial before the United States District Court for the Southern District of New York, of criminal contempt for having violated a decree of that court (Ex. 10, R. 111–125).

The decree had been entered February 6, 1932, in an equity suit brought by the United States under the Sherman Antitrust Act (15 U. S. C. A. 1, 2, 4) (R. 13–22). It enjoined 99 defendants, including Weiner, from committing various acts in furtherance of a conspiracy to restrain trade in the live poultry industry. It specifically enjoined them from using the offices of two labor unions to coerce marketmen to buy poultry feed and other commodities from particular sellers (R. 19–21). The decree was affirmed by this Court in *Local 167 et al.* v. *United States,* 291 U. S. 293 (1934).

An information charging criminal contempt, filed July 31, 1933, charged Weiner and others with various acts of coercion and intimidation in violation of the decree. Weiner was convicted of the charges contained in paragraph 4 of the information, alleging that he and others had used the offices of Local 167 and the Shochtim Union to coerce marketmen to buy feed from the Metropolitan Poultry Feed Corporation, and of the charges contained in paragraphs 5 and 6, alleging that he had coerced marketmen to rent poultry coops from the New Jersey Coop Company and had used his office as a delegate of the Shochtim Union for this purpose (R. 40–43).

Upon conviction Weiner was originally sentenced to serve six months in Detention Headquarters for the contempts charged in paragraph 4 of the information, and in addition two years in the

penitentiary for the contempts charged in paragraphs 5 and 6 (R. 129). Thereafter, he applied to the court for a modification of his sentence, and with his express consent, the six months sentence, which was to have been served consecutively after service of the two year sentence, was increased to a year and a day in the penitentiary, to be served concurrently with the two year sentence (R. 279).

Weiner appealed to the Circuit Court of Appeals for the Second Circuit, but withdrew his appeal on June 29, 1934 (Exs. 6, 7, 8, R. 90–98).

Thereafter Weiner was committed to the United States Northeastern Penitentiary at Lewisburg, Pennsylvania (R. 24–25), situated in the Middle District of Pennsylvania.

On May 7, 1935, Weiner filed a petition for a writ of *habeas corpus* in the District Court for the Middle District of Pennsylvania, alleging that he had been sentenced to the penitentiary for two years, that the court had no power to sentence him for longer than six months, and that having served six months he was entitled to be discharged (R. 5–12).

The District Court for the Middle District of Pennsylvania granted Weiner's petition and ordered that he be discharged from the United States Northeastern Penitentiary (R. 292–3). The Circuit Court of Appeals for the Third Circuit affirmed, January 8, 1936, one judge dissenting. The warden filed a petition for rehearing,

pointing out that the court had failed to consider the only Supreme Court case in point, *United States* v. *Goldman,* 277 U. S. 229. The court granted a rehearing, and on June 8, 1936, filed an opinion on rehearing, again affirming the judgment of the District Court.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Third Circuit erred:

1. In holding that the six months' limitation on contempt sentences, provided for in Sections 21 and 22 of the Clayton Act, applies to contempts for disobedience of a decree entered in a suit brought by the United States, and that such contempts are not excepted from the provisions of Sections 21 and 22 by Section 24 of the Clayton Act;

2. In holding that the contempts of which Weiner was convicted were independent criminal offenses within the meaning of Section 21 of the Clayton Act;

3. In holding that the contempt trial followed the procedure of the Clayton Act rather than the ordinary procedure for criminal contempt;

4. In failing to take into consideration Weiner's express consent to the imposition of a sentence in excess of six months.

REASONS FOR GRANTING THE WRIT

1. The court below erroneously held that the six months' limit on contempt sentences contained in Sections 21 and 22 of the Clayton Act applied to

Weiner's sentence for violation of a Government decree, and failed to give effect to the express provision of Section 24 of the Clayton Act that nothing contained in Sections 21 and 22 shall be construed to relate to contempts committed in disobedience of any lawful decree entered in any suit or action brought by the United States.

Section 21 of the Clayton Act provides:

> Any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed shall be proceeded against for his said contempt as hereinafter provided. (28 U. S. C. A. 386.)

Section 22 of that Act prescribes the procedure in punishing contempts within the Act, providing in part:

> In all cases within the purview of this Act such trial may be by the court, or, upon demand of the accused, by a jury.
>
> * * * * *
>
> If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such fine shall be paid to the United States

> or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months. (28 U. S. C. A. 387.)

The scope of these two sections is expressly limited by Section 24 of the Clayton Act, which provides:

> Nothing contained in sections 386 to 388 and 390 of this title [Sections 21 to 23 and 25 of the Clayton Act] shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within Section 386 of this title, may be punished in conformity to the usages at law and in equity prevailing on October 15, 1914. (28 U. S. C. A. 389.)

The language of Section 24 is free from ambiguity. It provides that the requirement for jury trial and the six months limitation in Sections 21 and 22 shall not apply to contempts committed in

disobedience of *any* lawful decree entered in any suit or action *brought by the United States.*

The decree violated by Weiner was entered in a suit brought by the United States, namely, the suit entitled *Local 167 et al.* v. *United States,* 291 U. S. 293.[1]

Section 24 specifically provides that contempts of such decrees (i. e., Government decrees) shall be prosecuted in conformity to prior usages—in other words, in accordance with Section 268 of the Judicial Code (28 U. S. C. A. 385), which provides that the federal courts shall have power "to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority."

Section 24 limits the application of Sections 21 and 22 to contempts of *private* decrees, such as those obtained by employers against employees. The legislative history of the Clayton Act shows that Congress deliberately differentiated between contempts of private decrees and contempts of Government decrees, in order that "the Government's ancient rights as a litigant be not impaired." *United States* v. *Taliaferro,* 290 Fed. 214 (W. D. Va., 1922), affirmed, 290 Fed. 906 (C. C. A. 4th, 1923); (48 Cong. Rec., pt. 9, p. 8778, 62nd Cong., 2nd Sess.; pt. 12 App., p. 314; pt. 9, pp. 8779, 8780, 8785.)

[1] In the District Court for the Southern District of New York this suit was entitled *United States* v. *Greater New York Live Poultry Chamber of Commerce et al.*

The present case is parallel to that of *United States* v. *Goldman*, 277 U. S. 229 (1928), where this Court interpreted the plain language of Section 24 as meaning that nothing contained in Sections 21, 22, 23 and 25 shall apply to contempts of decrees obtained by the United States. In that case, as in the present, the United States filed an information charging defendants "with criminal contempts committed by violating an injunction that had been granted by the court in a suit in equity brought by the United States * * * to enforce the Sherman Antitrust Act" (p. 233). The criminal contempt proceeding there charged violation of the decree which had been obtained by the United States in a suit against the National Cash Register Company and others. The District Court dismissed the information on the ground that, under Section 25 of the Clayton Act, the prosecution was barred by the statute of limitations of one year. This Court reversed, saying (pp. 238–239):

> Sec. 21 relates only to the prosecution for the disobedience of orders, decrees, etc., by doing any forbidden act which is of such character as to constitute also a criminal offense under a federal statute or state law. And Sec. 24 specifically declares that "*nothing herein contained*"—*meaning evidently no provision in the Act relating to prosecutions for criminal contempts*—shall be construed to relate to contempts committed in

> disobedience of any order, *decree,* etc., *entered in any suit brought in the name or on behalf of the United States*; but that these and all other cases of contempt not specifically embraced within Sec. 21, may be punished in conformity to the prevailing usages at law and in equity.
>
> It is plain, we think, that this specific exception in Sec. 24, applies to Sec. 25 relating to the period of limitations *as well as to the other sections,* and hence that the one year limitation prescribed by Sec. 25 has no application to the proceeding in the present case, which was brought for the disobedience of a decree entered in a suit brought and prosecuted in the name and on behalf of the United States. (Italics supplied.)

In pointing out that the exceptions provided by Section 24 apply to Section 25 "as well as to the other sections," it is clear that this Court had no doubt whatever that Section 24 limited the application of Sections 21 and 22 (providing for jury trial and limiting sentence to 6 months); the only doubt arose in connection with Section 25 (providing a one-year statute of limitations), because it followed rather than preceded Section 24.

The majority opinion of the court below is squarely in conflict with the opinion of this Court in the *Goldman* case. Neither the original opinion of the Circuit Court of Appeals nor its opinion on rehearing considered the *Goldman* case or any of the decisions of other Circuit Courts of Appeals

construing Section 24 of the Clayton Act, which are clearly in conflict with the decision below.[2]

In *Michaelson* v. *United States,* 266 U. S. 42, 66 (1924), this Court, in holding Sections 21–24 constitutional, called attention to the "narrow scope" of Section 22 and the limitations placed upon it by Section 24.

2. An additional ground for holding that the proceeding is not governed by Section 22 of the Clayton Act is that Section 21 requires that the contempt constitute an independent criminal offense. The Circuit Court of Appeals erroneously held that the contempts of which Weiner was con-

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[2] In *Forrest* v. *United States*, 277 Fed. 873, 876 (C. C. A. 9th, 1922), it was held that the right to jury trial under Section 22 of the Clayton Act did not apply to cases where the decree violated had been "issued in a suit by the United States in its behalf," because of the express language to that effect in Section 24. In *Swepston* v. *United States*, 251 Fed. 205, 210 (C. C. A. 6th, 1918), the court rejected the contention that the requirement for jury trial in Section 22 of the Clayton Act applied to a contempt proceeding based upon violation of an order of commitment entered in a criminal suit brought by the United States, and held that Section 24 applied. See also *Canoe Creek Coal Company* v. *Christinson*, 281 Fed. 559, 564–565 (D. C. Ky., 1922; reversed on other grounds in 293 Fed. 379, 266 U. S. 42), where the court concluded that Sections 21, 22 and 24 were not intended to repeal the broad, general provisions for contempt contained in Section 268 of the Judicial Code. A sentence of one year and a day for contempt of court has been held to be within the "discretion of the court" within the meaning of Section 268 of the Judicial Code. *Creekmore* v. *United States*, 237 Fed. 743 (C. C. A. 8th, 1916; certiorari denied 242 U. S. 646).

victed were independent criminal offenses within the meaning of Section 21.

It appears to have reached its conclusion from the fact that the decree was originally based upon a violation of the Sherman Act, which is a criminal offense. The court erroneously assumed that the decree merely enjoined future violations of the Sherman Act and that therefore when Weiner violated the decree he necessarily committed an independent criminal offense. The decree enjoins specific overt acts, such as using the offices of two labor unions to coerce marketmen to buy feed from particular sellers. The scope of this decree was attacked in *Local 167* v. *United States*, 291 U. S. 293 (1934), where appellants (including Weiner) complained that the decree enjoined acts which were in themselves not violations of the Sherman Act. This Court affirmed the decree, recognizing the power of a court of equity, in order to afford "effective relief", to enjoin specific acts which by themselves did not constitute restraints upon interstate commerce.

3. There is no basis for the conclusion of the court below that the trial judge in the District Court for the Southern District of New York followed the procedure of the Clayton Act rather than the general procedure for criminal contempt cases. This conclusion was based upon the fact that the defendants at the contempt trial waived any right which they might have to trial by jury. The record

clearly shows that jury trial was waived, not because of any thought that Section 22 of the Clayton Act governed, but because of a suggestion made at the outset of the proceeding that the trial procedure was governed by Section 11 of the Norris-La Guardia Anti-Injunction Act (29 U. S. C. A. 111), granting a right to trial by jury in contempt cases involving labor disputes (R. 303–307). Weiner's counsel at the contempt trial expressly stated that Section 268 of the Judicial Code applied (R. 303).

4. The Circuit Court of Appeals failed to consider the contention that Weiner had expressly consented to the imposition of a sentence in excess of six months. He was originally sentenced to serve consecutively six months in the Detention Headquarters and two years in the penitentiary. Upon his application and express consent, the six months' sentence was increased to a year and a day, in order that it might be served concurrently with the two year penitentiary sentence (Ex. 12, R. 278–280). After expressly consenting to the imposition of a sentence in excess of six months, Weiner should not be permitted to attack the sentence on the very ground that it exceeds six months.

The effect of the holding of the Circuit Court of Appeals is to limit all sentences for contempt of Government decrees under the antitrust laws to six months, despite the express language of Section 24 that Sections 21 and 22 shall not apply to con-

tempts of decrees obtained by the United States. The majority opinion below is not only in conflict with the plain wording of the statute and the decisions of other Circuit Courts of Appeals on the same matter, but it also ignores the decision of this Court in the *Goldman* case squarely holding that under Section 24 of the Clayton Act nothing contained in Sections 21, 22, 23 and 25 shall apply to contempts of decrees obtained by the United States.

Wherefore, it is respectfully submitted that this petition should be granted.

STANLEY REED,
Solicitor General.

JULY 1936.

U. S. GOVERNMENT PRINTING OFFICE: 1936

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	3
Specification of errors to be urged	7
Argument:	
I. The two-year contempt sentence was properly imposed by the court within its discretion under Section 268 of the Judicial Code. The power of the court to impose such a sentence is not restricted by Sections 21 and 22 of the Clayton Act limiting contempt sentences to six months because Section 24 of that Act expressly provides that the limitations of Sections 21 and 22 shall not apply to contempts of decrees entered in suits brought by the United States	8
II. The contempt charges against respondent were not tried under the procedure of the Clayton Act	20
III. Respondent's consent to the imposition of a sentence in excess of six months precludes him from attacking the sentence on the very ground that it exceeds six months	23
Conclusion	24

CITATIONS

Cases:	
Canoe Creek Coal Co. v. *Christinson*, 281 Fed. 559	14
Creekmore v. *United States*, 237 Fed. 743	8
Forrest v. *United States*, 277 Fed. 873	14
Local 167 et al. v. *United States*, 291 U. S. 293	1, 4
Magnard v. *United States*, 23 F. (2d) 141	19
Michaelson v. *United States*, 266 U. S. 42	11, 14
Swepston v. *United States*, 251 Fed. 205	14
United States v. *Goldman*, 277 U. S. 229	7, 12, 22
United States v. *Taliaferro*, 290 Fed. 214	15
Statutes:	
Clayton Act:	
Section 21 (U. S. C., Tit. 28, Sec. 386)	9
Section 22 (U. S. C., Tit. 28, Sec. 387)	9
Section 24 (U. S. C., Tit. 28, Sec. 389)	10

108738—36——1

Statutes—Continued.

	Page
Judicial Code:	
Section 268 (U. S. C., Tit. 28, Sec. 385)	3, 8
Norris-La Guardia Anti-Injunction Act:	
Section 11 (U. S. C., Tit. 29, Sec. 111)	20

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 171

HENRY C. HILL, WARDEN, UNITED STATES NORTHEASTERN PENITENTIARY, PETITIONER

v.

UNITED STATES EX REL. JOSEPH WEINER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the District Court (R. 146–149) is reported in 11 F. Supp. 195. The majority and dissenting opinions in the Circuit Court of Appeals (R. 163–169) are reported in 84 F. (2d) 27, and the opinion of the Circuit Court of Appeals on rehearing (R. 176–179) is reported in 84 F. (2d) 31.

The decree violated by respondent was upheld by this Court in *Local 167 et al.* v. *United States,* 291 U. S. 293.